IN THE SUPREME COURT OF MISSOURI

Case No. SC88018

COMMITTEE FOR A HEALTHY FUTURE, INC., et al.
Respondents/Cross-Appellants,

v.

ROBIN CARNAHAN, MISSOURI SECRETARY OF STATE,
Respondent/Cross-Respondent,

and

LOUIS SMITHER, et al.,
Appellants/Cross-Respondents,

and

CHRIS KEMPH, et al.
Cross-Respondents.

Appeal from the Circuit Court of Cole County
Case No. 06AC-CC00707
Honorable Thomas J. Brown, III

APPELLANTS/CROSS-RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the current matter based upon Article V, Section 3 of the Missouri Constitution. The Respondents/Cross-Appellants claim that Section 116.080, RSMo 2000 is invalid under the Missouri and United States Constitutions as violative of free speech rights guaranteed thereunder. As a result of the claims raised by the Respondents/Cross-Appellants the validity of a statute is in question and thus this Court has jurisdiction under Article V, Section 3 of the Missouri Constitution.

Additionally, matters contained herein relate to the general election, scheduled for November 7, 2006, and rise to a level of such general interest and importance that this Court should review the issues raised in this matter.

STATEMENT OF FACTS

The underlying action from which this appeal arises was a petition challenging the decision of Respondent/Cross-Respondent Robin Carnahan, Missouri Secretary of State (hereinafter "Resp./Cross-Resp. Secretary") that the Respondents/Cross-Appellants Committee for a Healthy Future, Inc., et al. (hereinafter "Resp./Cross-App. Committee") had not submitted the requisite number of Initiative Petition signatures of legal voters concerning the Initiative Petition which would impose increased taxes in Missouri upon cigarettes and other tobacco products. (L.F. 8-22.) Appellants/Cross-Respondents Louis Smither, Hal Swaney and Missourians Against Tax abuse (hereinafter "App./Cross-Resp. Missourians") filed and were granted their motion to intervene. (L.F. 2; 23-29.) In addition to supporting Resp./Cross-Resp. Secretary's determination that the petitions submitted by Resp./Cross-App. Committee were insufficient, App./Cross-Resp. Missourians filed cross-claims challenging that the initiative petition appropriated existing state revenues by amendment, that the initiative petition did not have a single purpose nor could such be identified, that certain voters who signed the initiative petition listed addresses different from those which they had identified to local election authorities and that the signatures collected were invalid due to errors and inaccuracies within the voter rolls.

Statutory Background

Section 115.335.7, RSMo[1], allows the Secretary of State to adopt rules to ensure

uniform, complete and accurate checking of petition signatures by actual counting or through random sampling.

Chapter 116 of the Revised Statutes of Missouri sets forth the procedures for an initiative petition to be certified and circulated for signatures. Section 116.040, RSMo provides the form for each page of an initiative petition for an amendment to the Missouri Constitution. Included in that form of petition are a list of signature line fields that must be filled out by a signatory on the petition. *Id.* Those fields are the signed name of the registered voter, date, address, zip code, congressional district, and printed or typed name of the registered voter. The petition must have a certain affidavit completed by the circulator and attested to by a notary. *Id*. When a voter wishes to sign an initiative petition but is unable to do so, the circulator is permitted to print the required information on the petition. Section 116.070, RSMo.

Section 116.080, RSMo, provides that initiative petition circulators are to register and submit certain information to the Secretary of State. The Secretary of States does not count as valid any signatures on initiative petition pages collected by any person who was not properly registered as a circulator. Section 116.120.1, RSMo. The Secretary of State may send copies of petition pages to local election authorities for verification that the persons whose names are listed as signers are registered voters. Section 116.130.1, RSMo Cumm. Supp. 2005. The local election authority is mandated to maintain all voter registration records. Section 115.145, RSMo.[2]

If the local election authority or the Secretary of State determines that an incorrect congressional district number is written after the signature of the voter, the election authority or the Secretary of State may correct the congressional district number on the petition page. Section 116.130.3, RSMo Cumm. Supp. 2005. The election authority shall return the copies of the petition pages to the Secretary of State and certify the total number of valid signatures from each Congressional District. Section 116.130.4, RSMo Cumm. Supp. 2005. The Secretary of State is authorized to adopt rules to ensure uniform, complete and accurate checking of petition signatures by actual count or random sampling. Section 116.130.5, RSMo Cumm. Supp. 2005.

The Secretary of State shall issue a certificate of insufficiency if she determines that the petition is insufficient. Section 116.150, RSMo. After such certification of the petition by the Secretary of State, any citizen may appeal the decision of the Secretary of State within ten days after the certification is made. Section 116.200, RSMo.

The Initiative Petition at Issue

The Initiative Petition would increase the state cigarette tax by eighty cents per package, from 17¢ to 97¢, and would increase the current state tax on other tobacco products by 20%. (L.F. 19.)

On or about February 15, 2006, Resp./Cross-Resp. Secretary approved the form of the initiative petition and certified the ballot title for circulation. (L.F. 89.) On May 7, 2006, Resp./Cross-App. Committee filed the initiative petition with Resp./Cross-Resp. Secretary. (L.F. 89.) Resp./Cross-Resp. Secretary made copies of the initiative pages and sent one copy

each to the Jackson County Board of Election Commissioners, the Kansas City Board of Election Commissioners and the Cass County Clerk. (L.F. 92.) The three local election authorities certified that the petition pages included a total of 25,133 signatures of registered voters from the Fifth Congressional District. (L.F. 93.)

On August 8, 2006, Resp./Cross-Resp. Secretary issued a certificate of insufficiency of petition certifying that the initiative petition did not contain a sufficient number of valid signatures. (L.F. 29.) Resp./Cross-Resp. Secretary did not count 1,880 signatures on the tobacco tax initiative petition collected by circulators who failed to register at all, or only registered for other petitions. (L.F. 78-79.)

On August 18, 2006, Resp./Cross-App. Committee initiated this litigation by filing a Petition. (L.F. 8-22.) On the same date, August 18, 2006, App/Cross-Resp. Missourians filed their Motion to Intervene and Answer, Affirmative Defenses and Cross Claim. (L.F. 23-28.) On August 22, 2006, Cross-Respondents Chris Kemph and Newell T. (Chip) Baker, Jr. filed their Motion to Intervene The motions were granted on August 24, 2006. (L.F. 2.) Cross-Respondents Chris Kemph and Newell T. (Chip) Baker, Jr.'s Answer, Affirmative Defenses and Cross Claim were filed on August 24, 2006. (L.F. 62-74.)

On August 25, 2006, Ray. S. James, the Republican director of elections for the Kansas City Board of Elections, electronically mailed the Secretary of State requesting certain copies of the initiative petitions as his office was reviewing the signatures. (Jt. Ex. P. Deposition of Ray James, 6:19; 7:10; 29:16-20; Jt. Ex. S. Deposition of Betsy Byers, 21:17-19.)

On September 1, 2006, a hearing was held. (L.F. 4.) The trial court entered a Memorandum Opinion on September 7, 2006. (L.F. 83-88.) The trial court held that under Section 116.080, RSMo, circulators are required to register and submit certain information to the Secretary of State and that the Secretary of State cannot count signatures collected by circulators who did not register and submit the required information to the Secretary of State. (L.F. 83.) The trial court determined that Resp./Cross-Resp. Secretary acted properly and in accordance with Chapter 116 when she did not count 1,880 signatures on the initiative petition collected by circulators who failed to register or only registered for other petitions. (L.F. 83-84.) The trial court also held that the circulation requirements did not violate the Missouri Constitution and were designed to facilitate an orderly initiative process. (L.F. 84-85.) The Court also held that the circulator registration requirements did not violate the First Amendment and cited *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 (1999). (L.F. 85.) The trial court also held that certain signatures of individuals who signed the petition and listed different addresses on the petition than those listed on their voter registration were valid. (L.F. 86.) The trial court determined that the petition did not contain multiple subjects and that the proposed tax did not appropriate money other than the taxes proposed under the initiative. (L.F. 87.)

On September 8, 2006, the parties filed a Joint Stipulation of Facts and Exhibits and Presentation of Issues. (L.F. 89-118.) The stipulation contained a presentation of issues by the App./Cross-Resp. Missourians, which included petition pages with disputed notary information, petition pages with disputed circulator information, petition pages without a

signature date, petition signature lines where the petition signer either printed their name in both name blanks or signed their name in both name blanks, petition signatures with illegible printed names, petition signatures with illegible addresses, petition signatures where a person other than the petition signer completed signer information other than the signature, and the signatures where the petition signer listed a different address than the address registered with the local election authority. (L.F. 89-116.)

On September 8, 2006, a trial was held before the Honorable Thomas J. Brown. (L.F. 137.) On September 11, 2006, parties filed a Joint Post-Hearing Memorandum. (L.F. 117-137.) Of the 1,300 signatures which Resp./Cross-App. Committee contended were valid and not counted, App./Cross-Resp. Missourians disputed 1,293. (L.F. 118.) In addition, App./Cross-Resp. Missourians challenged other signatures based on 3,547 defects found in the initiative petitions submitted to the Secretary of State. (L.F. 125-134.)

On September 11, 2006, the trial court issued a final judgment. (L.F. 137-146.) It determined that there were sufficient numbers of signatures of legal voters for the tobacco tax initiative petition and ordered the Respondent/Cross-Respondent Secretary to certify the tobacco tax initiative petition as sufficient for placement on the November 7, 2006, general election ballot. (L.F. 145-146.) Also on September 11, 2006, the trial court reissued the memorandum opinion previously filed on September 7, 2006. (L.F. 83-88.) The trial court designated the document as a Final Judgment. (L.F. 166-170.)

App./Cross-Resp. Missourians filed their appeal on September 12, 2006. (L.F. 152-153.) Resp./Cross-App. Committee filed their appeal on September 13, 2006. (L.F. 173.)

STANDARD OF REVIEW

This case arises from a judge-tried case before the Circuit Court of Cole County. Accordingly, the standard of review is that established in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). Questions of law are reviewed de novo. *Leggett v. Mo. State Life Ins.*, 342 S.W.2d 833, 850 (Mo. banc 1960).

I.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURES OF REGISTERED VOTERS SIGNING AN INITIATIVE PETITION WITH A DIFFERENT ADDRESS THAN THAT ON THEIR VOTER REGISTRATION (RDA'S) ARE NOT VALID SIGNATURES BECAUSE ONLY SIGNATURES WHERE THE ADDRESS LISTED ON THE PETITION PAGE CORRESPONDS TO THE ADDRESSES ON THE VOTER REGISTRATION RECORDS ARE SIGNATURES OF LEGAL VOTERS UNDER SECTION 116.130.1, RSMO CUMM. SUPP. 2005 AND ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION.

Yes to Stop Callaway Committee v. Kirkpatrick, 685 S.W.2d 209 (Mo. App. W.D. 1984)

Payne v. Kirkpatrick, 685 S.W.2d 891 (Mo. App. W.D. 1984)

Bartlett & Company Grain v. Director of Revenue, 649 S.W.2d 220 (Mo. App. 1983)

Section 116.130, RSMo

II.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT THE SIGNATURES WHERE THE CONGRESSIONAL DISTRICT DESIGNATION WAS OMITTED ARE INVALID BECAUSE SECTIONS 116.040, RSMO, AND 116.130.3, RSMO, MANDATE THAT A SIGNER COMPLETE A CONGRESSIONAL DISTRICT DESIGNATION ON THE SIGNATURE LINE FOR SUCH A SIGNATURE TO BE VALID.

Herst Corp. v. Director of Revenue, 779 S.W.2d 557 (Mo. banc 1989)

Vance Brothers, Inc. v. Obermiller Construction Services, Inc., 181 S.W.3d 562 (Mo. banc 2006)

Section 116.040, RSMo

Section 116.030.3, RSMo

III.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT NAMES AND ADDRESSES WHICH DID NOT MATCH THE PHYSICAL VOTER REGISTRATION RECORDS ON FILE WITH LOCAL ELECTION AUTHORITIES ARE INVALID BECAUSE SECTION 116.130.1, RSMO, ONLY ALLOWS THE LOCAL ELECTION AUTHORITIES TO USE THE VOTER REGISTRATION RECORDS ON FILE IN THEIR JURISDICTION FOR VERIFICATION OF NAMES AND ADDRESSES AND NOT ON THE STATEWIDE ELECTRONIC VOTER DATABASE CONTROLLED BY RESPONDENT/CROSS-RESPONDENT SECRETARY.

In re Nader, 858 A.2d 1167 (Pa. 2004)

Yes to Stop Callaway Committee v. Kirkpatrick, 685 S.W.2d 209

(Mo. App. W.D. 1984

Section 116.130.1

IV.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURE LINES WITH INCOMPLETE NAMES, ADDRESSES AND DATES SHOULD NOT HAVE BEEN COUNTED BECAUSE THE FAILURE TO FULLY AND ACCURATELY COMPLETE SIGNATURE LINES ON A PETITION RESULTS IN SUCH SIGNATURES BEING INVALID UNDER SECTION 116.130, RSMo.

In re Nader, 865 A.2d 8 (Pa. 2004)

Yes to Stop Callaway Committee v. Kirkpatrick, 685 S.W.2d 209

(Mo. App. W.D. 1984

Section 116.070, RSMo

V.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURES ON PETITION PAGES WITHOUT A COMPLETE CIRCULATOR'S AFFIDAVIT SHOULD NOT BE COUNTED BECAUSE SUCH SIGNATURES DO NOT COMPLY WITH SECTION 116.040, RSMO, WHICH REQUIRES THE CIRCULATORS OF INITIATIVE PETITIONS TO COMPLETE AN AFFIDAVIT INCLUDING THE CIRCULATOR'S SIGNATURE, WHICH MUST BE NOTARIZED.

Section 116.080, RSMO

Section 116.040, RSMo

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999)

VI.

THE COURT ERRED IN DECLARING THAT THE TOBACCO TAX INITIATIVE PETITION WAS SUFFICIENT IN THAT THE PROPOSED AMENDMENT VIOLATES ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION BECAUSE IT USES THE INITIATIVE TO APPROPRIATE EXISTING STATE REVENUES FOR THE PURPOSES OF THE AMENDMENT IN EXCESS OF THE REVENUES GENERATED BY THE PROPOSED TOBACCO TAX BY MANDATING ADDITIONAL GOVERNMENT EXPENDITURES TO ADMINISTER THE PROGRAMS WITHOUT PROVIDING FUNDS FOR SUCH ADMINISTRATION AND BY FIXING EXISTING APPROPRIATIONS FOR CERTAIN PROGRAMS.

Article III, Section 51 of the Missouri Constitution

State ex rel. Card v. Kauffman, 517 S.W.2d 78 (Mo. 1974)

VII.

THE COURT ERRED IN DECLARING THAT THE TOBACCO TAX INITIATIVE PETITION WAS SUFFICIENT IN THAT THE PROPOSED AMENDMENT VIOLATES ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION BECAUSE IT CONTAINS MULTIPLE SUBJECTS BY ADDING TOBACCO ISSUES AND A MAJOR MEDICAID PROGRAM EXPANSION AND ALTERING THE STATE AUDITOR'S DUTIES.

Article III, Section 50 of the Missouri Constitution

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. banc 1990)

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. banc 1974)

INTRODUCTION

ARGUMENT

This case arises out of an attempt to place a Tobacco Tax Initiative Petition on the November 7, 2006 general election ballot by the Respondents/Cross-Appellants Committee. Respondents/Cross-Appellants Committee circulated petitions for signatures which were ultimately filed with Respondent/Cross-Respondent Secretary, who transmitted those petitions to local election authorities to validate signatures. Ultimately, Respondent/Cross-Respondent Secretary determined that there were not a sufficient number of signatures in the 5th Congressional District and thus issued her Certificate of Insufficiency of the Petition. Respondents/Cross-Appellants Committee sought judicial review of Respondent/Cross-Respondent Secretary's decision before the Circuit Court of Cole County.

The trial court incorrectly determined that certain signatures which local election authorities had not counted as valid should be determined to be valid and ordered Respondent/Cross-Respondent Secretary to issue a Certificate of Sufficiency and place the proposed Initiative Petition on the November 7, 2006 ballot. The trial court's decision was in error and should be reversed by this Court.

The purpose of judicial review of initiative petitions "...is to ask whether the constitutional requirements and limits of power as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded. *Edwards v. Lesuer*, 132 Mo. 410, 33 S.W. 1130, 1133 (Banc 1896)." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). In considering the process of particular

initiative petitions, "the validity of the signatures is the heart of the ultimate determination 'of the sufficiency of an initiative petition for the ballot.' *United Labor Commission v. Kirkpatrick*, 572 S.W.2d 449, 455 (Mo. banc 1973)." *Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. W.D. 1992). The purpose of Chapter 116, RSMo is to insure the integrity of the initiative process. *Id.*

It is clear under the statutory scheme of the State of Missouri, the Missouri Constitution, and the decisions interpreting the Constitution and statutes, that the proponents' attempts to place the Initiative Petition on the November 7, 2006 ballot should not succeed and that this Court should reverse the decision of the trial court and order the Initiative Petition stricken from the November 7, 2006 ballot.

I.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURES OF REGISTERED VOTERS SIGNING AN INITIATIVE PETITION WITH A DIFFERENT ADDRESS THAN THAT ON THEIR VOTER REGISTRATION (RDA'S) ARE NOT VALID SIGNATURES BECAUSE ONLY SIGNATURES WHERE THE ADDRESS LISTED ON THE PETITION PAGE CORRESPONDS TO THE ADDRESS ON THE VOTER REGISTRATION RECORD ARE SIGNATURES OF LEGAL VOTERS UNDER SECTION 116.130.1, RSMO CUMM. SUPP. 2005 AND ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION.

Section 116.130.1, RSMo Cumm. Supp. 2005 permits the Secretary of State to send copies of petitions to local election authorities to determine that the persons whose names are listed as signers to the petitions are registered voters. Two Missouri cases, from the Western District, have reviewed the issue of voters' addresses: *Yes to Stop Callaway Committee v. Kirkpatrick*, 685 S.W.2d 209 (Mo. App. W.D. 1984) and *Payne v. Kirkpatrick*, 685 S.W.2d 891 (Mo. App. W.D. 1984).

The Western District Court of Appeals in *Yes to Stop Callaway Committee* reviewed an initiative petition which would have placed a proposed law prohibiting the operation of nuclear power plants in the State of Missouri. The initiative petition was determined to be 331 signatures short in Greene County and thus the Secretary of State did not place the

proposition on the ballot in 1984. *Yes to Stop Callaway Committee v. Kirkpatrick*, 685 S.W.2d 209, 210 (Mo. App. W.D. 1984). A number of issues were raised before the Western District regarding the attempts by the proponents of that petition to rehabilitate signatures in a sufficient manner to place the proposition on the ballot. The Court conducted an exhaustive analysis of the petition signature provisions contained in Chapter 116, RSMo and certain related election provisions contained in Chapter 115, RSMo which is the general election law of the State of Missouri. The Court noted that the most important question related to 822 signatures in Greene County in the 7th Congressional District because the addresses listed on the initiative petition differed from the addresses such signers had on their voter registration records. The Court stated:

> The precise question is thus whether or not the Secretary of State can count a person's signature on an initiative petition when that person is registered to vote at one address, but lists a different address on the petition.

Id.

The Western District then reviewed this Court's decision of *Scott v. Kirkpatrick*, 513 S.W.2d 442 (Mo. banc 1974) in determining that a person must be a valid registered voter to sign an initiative petition. *Id.*

The *Callaway* court held:

> "Section 116.130.1, RSMo Supp. 1983, permits the Secretary of State to send copies of the petition pages to election authorities

> to verify that the persons whose names are listed as signers are registered voters. That section further provides that only the signatures of persons registered as voters in the county shall be counted as valid. **It necessarily follows that the only signatures which may be counted are those of persons who give addresses corresponding to that shown on their registration records.** (Emphasis added.)

Callaway, supra, at 211.

The Western District emphasized in its analysis that the fundamental substance of this Court's decision in *Scott v. Kirkpatrick* was that a person "must be legally entitled to vote on the measure proposed by the initiative petition on the day that he signs it." *Id.* The Court then continued:

> The persons who signed the initiative petition in this case, but listed an address different from that shown on their registration record had obviously not transferred their registration and were thus not eligible to vote on the day they signed the petition. The petition does not show the date these persons actually signed, but the Greene County Clerk examined the petition on August 16, 1984. This was before the 4th Wednesday prior to the election to be held on November 6, 1984. These persons were clearly not eligible to vote when they signed the petition, and

> under the *Scott* rationale were therefore ineligible to have their signature counted.

Id. The Court also reviewed a number of decisions from Arizona that also supported this decision.

The *Yes to Stop Callaway* decision has been precedent in the State of Missouri for nearly 22 years. It has not been reversed or questioned by any court and with respect to signatures where the person's signature and address differs from the address on the voter registration records, it stands as good law that the signatures must not be counted for purposes of determining whether a sufficient number of signatures had been obtained under Article III, Section 50 of the Missouri Constitution.

Shortly after the *Yes to Stop Callaway Committee*, the Western District was again presented with a similar question in *Payne v. Kirkpatrick*, 685 S.W.2d 891 (Mo. App. W.D. 1984). In *Payne, supra*, proponents of a proposed constitutional amendment authorizing para-mutual waging on horse racing argued that the initiative petition should be certified as sufficient. While the proponents of that amendment were ultimately successful in having the amendment placed on the election ballot in 1984, the Western District did reject a number of signatures where the registered voter's address was different than the address placed upon the initiative petition. While the Court found that the total number of signatures in question were insignificant and did not affect the final outcome the Court did directly address the issue of petition addresses matching the addresses registered with the election authority, stating:

> This precise issue was answered in this court's opinion in *Yes to Stop Callaway Committee v. Kirkpatrick, et al.*, 685 S.W.2d 209 (Mo. App. 1984). **Thus, signatures and addresses upon any initiative petition which, when compared with registered voters' records reflect a different address, are invalid and are not to be counted.** (Emphasis added.)

Payne, *supra*, at 903.

The *Payne* case and the *Yes to Stop Callaway* case both remain good law in the State of Missouri. There has been no judicial determination that those cases should be overturned for any reason and thus signatures listing a different address than the address of the signer's registration records with the local election authority should be rejected.

The trial court rejected the guiding precedent of *Yes to Stop Callaway* and of *Payne* and instead focused upon some legislative changes to the statutes regarding registration dates to determine that the longstanding precedent of the State of Missouri had no control over the current fact situation. The trial court erred in making this decision, as a review of the statutory changes clearly indicates.

While it is true that the statutes which were relied on in the *Callaway* and *Payne* decisions have been amended, none of the amendments substantially affects the underlying basis for either decision. In the *Callaway* analysis, the Western District analyzed certain statutes which supported its decision, an analysis of the changes to those statutes is as follows:

Section 116.060:

In 1984, Section 116.060, RSMo Supp. 1983 provided that any registered voter may sign an initiative petition. Section 116.060, RSMo, was amended in 1999, which added the second sentence in the section which requires that the county be designated on the petition page. This is not a significant or controlling change.

Section 115.139:

In 1984, Section 115.139, RSMo 1978, prohibited any person who was not registered from voting, with two exceptions not material here. Section 115.139, RSMo, was amended in 1994 and 1997 to add another exception: section 115.132, RSMo, which allows a new resident to vote for president and vice president. This is also not a significant or controlling change.

Sections 115.155 and 115.159:

The Western District held that both sections 115.155 and 115.159, RSMo 1978, required a person to list his home address on his registration application. Section 115.155, RSMo Cumm. Supp. 2005, the registration form, was amended in 1986, 1988, 1993, 1997, 1999, 2003 and 2005 but the home address is still required. Section 115.159, RSMo Cumm. Supp. 2005, registration by mail, was amended in 1993, 1995, 1997, 2002 and 2003 but it continues to require a home address. These amendments have no effect upon the analysis of this case.

Section 115.165:

The *Callaway* Court held that section 115.165, RSMo Supp. 1983, allowed any registered voter who changed his place of residence within the same jurisdiction of an election authority to transfer his registration. Section 115.165, RSMo Cumm. Supp. 2005, was rewritten in 1997, 1986, 1988, 1993, and amended in 2003. Now, if the voter files a change of address application within the same jurisdiction, an election authority may change the address after comparing and verifying the signature on the application for change of address.

The Western District in *Callaway* held that Section 115.165.4, RSMo Supp. 1983:

> provides that any registered voter who changes his place of residence within a jurisdiction before 5:00 p.m. on the fourth Wednesday prior to an election, and does not transfer his registration by that time shall not be entitled to vote in that election. Such a person is thus in the same posture as an unregistered person.

Callaway, supra, at 211. Section 115.165.2, RSMo Cumm. Supp. 2005, now states:

> 2. A registered voter who has changed his or her residence within an election authority's jurisdiction and has not been removed from the list of registered voters pursuant to this chapter shall be permitted to file a change of address with the election authority or before an election judge at a polling place and vote at a central polling place or at the polling place that

> serves his or her new address upon written or oral affirmation by the voter of the new address.

The change in Section 115.165, RSMo Cumm. Supp. 2005, regarding transfer, liberalized the procedure for transferring registration, but did not alter the substantive requirement that a voter's address on the petition must be the same as the address registered with the local election authorities.

A review of the history of the changes of Section 115.165, RSMo, indicates that the requirement that a voter affirmatively inform the local election authority that he is changing his address is a requirement to allow such a voter to be a registered voter and vote at any election. Section 115.165, RSMo, as amended in 1994 (HB 1411) demonstrates that the intent remained to require a voter to appear before a local election authority and make an application for transfer and that the election authority would then be required to compare the signature on the application to the signature on the voter registration record to allow such a transfer to be made. The 1997 amendment to Section 115.165, RSMo (SB 132) maintained this requirement; however, the new provision allowed a person to not appear at the local election authority's office to make the change, but to provide written notice that the voter had moved. The current provision of Section 115.165, RSMo Cumm. Supp. 2005 clearly indicates that notice of some type is required:

> If the voter files a change of address application in person at the office of the election authority, at the polling place, or pursuant to section 115.159, 115.160, 115.162 or 115.193, or otherwise

> provide signed written notice of the move, including notice by facsimile transmission, an election authority may change the address on a voter registration record for a voter who moves within the election authority's jurisdiction after comparing and verifying the signature. Before changing the address on a voter record, the election authority shall be satisfied that the record is that of the person providing the change of address information.

Section 115.165.1, RSMo. Cumm. Supp. 2005. This language demonstrates that the written requirement of a notice of move and verification of that notice of move is a prerequisite to a voter being able to vote if they reside at a different address. The trial court in its decision completely ignored the plain language contained in Section 115.165.1, RSMo Cumm. Supp. 2005 and instead focused on the language in subsection 2 of that section. The provision that is now subsection 2 was placed in Section 115.165 in 1994 in House Bill 1411. House Bill 1411 was the Missouri enacting language dealing with the National Voter Registration Act. The provisions in subsection 2 are substantively unchanged from the enactment in 1994. However, the plain language of Section 115.165.2, RSMo Cumm. Supp. 2005 does not support the overturning or invalidating of the Western District's decisions in *Yes to Stop Callaway* and in *Payne*. Section 115.165.2, RSMo Cumm. Supp. 2005 simply provides that a voter may appear before the **election authority** at a polling place and give a "written or oral affirmation" of their new address. A voter who fails to take those actions is not eligible to vote at an election.

RDA's Should Be Excluded

It is undisputed that the voters in question representing the RDA's signatures, which were registered but with different addresses (hereinafter "RDA") on the Initiative Petition did not execute a written or oral affirmation to the election authority that they had changed their address as of the date that either they signed the petition, or that the local election authority verified the signatures. Since the voters' addresses were different than the addresses in the voter registration records as of the date of the signatures, they were not eligible to vote in the election. The Western District's determination in *Callaway* should stand holding that:

> Section 116.130.1, RSMo Supp. 1983, permits the Secretary of State to send copies of the petition pages to election authorities to verify that the persons whose names are listed as signers are registered voters. That section further provides that only the signatures of persons registered as voters in the county shall be counted as valid. **It necessarily follows that the only signatures which may be counted are those of persons who give addresses corresponding to that shown on their registration records.** (Emphasis added.)

Callaway, supra, at 211. Section 116.130, RSMo Cumm. Supp. 2005 was amended in 2003, but the authority which the court relied on remains intact in the statute. Respondent/Cross-Respondent Secretary violated Section 116.130.1, RSMo Cumm. Supp. 2005 when she

accepted petition addresses which varied from the addresses registered with the local election authorities.

The trial court in its decision also relied upon the Secretary of State's regulations dealing with signature verification. The regulations allow RDA's to be counted by the local election authority. Based upon the clear language of Chapter 116, RSMo and Chapter 115, RSMo and the Western District's precedent in *Yes to Stop Callaway* and in *Payne, supra*, the regulations of the Secretary of State are not valid as the regulations are in excess of the authority granted the Secretary of State under Chapter 116 or, in the alternative, the Secretary of State has violated its own regulation by allowing RDA's to be counted.

The purpose of Chapter 116, RSMo is to enforce uniformity and integrity in the initiative process. *Ketchum, supra* at 830. Unfortunately, Respondent/Cross-Respondent Secretary has promulgated rules which have the adverse effect. The regulations regarding signature verification procedures do not protect the integrity of the initiative process and far exceed the Respondent/Cross-Respondent Secretary's authority under Chapter 116, RSMo.

Respondent/Cross-Respondent Secretary has promulgated regulations regarding verification procedures for initiative petitions. 15 CSR 30-15.010. Respondent/Cross-Respondent Secretary cites Sections 115.335.7, RSMo Supp. 1998 and 116.130.5, RSMo Supp. 1999 as authority for the regulations. Section 115.335.7, RSMo states "the Secretary of State is authorized to adopt rules to insure uniform, complete and accurate checking of petition signatures either by actual counting or random sampling." Section 116.130.5, RSMo states "the Secretary of State is authorized to adopt rules to ensure uniform, complete and

accurate checking of petition signatures either by actual count or random sampling. No rule or portion of a rule promulgated pursuant to this section shall become effective unless it has been promulgated pursuant to the provisions of Chapter 536, RSMo." Chapter 115, RSMo refers to the general conduct of general elections and Chapter 116 specifically relates to initiative and referendum petitions.

15 CSR 30-15.010(2) states that the voter's name will be accepted only if it is exactly as it appears on the voting rolls, but then Respondent/Cross-Respondent Secretary lists numerous exceptions to her rule. According to 15 CSR 30-15.010(2)(A)1, Respondent/Cross-Respondent Secretary will accept names with or without middle initials when a first name is given, or with or without first initials when a middle name is given. Respondent/Cross-Respondent Secretary also allows substitution of common nicknames for the name on the voting roll, such as Dick for Richard, Liz or Beth for Elizabeth, Bill for William, Becky for Rebecca, etc. 15 CSR 30-15.010(2)2. She also allows the presence or absence of terms, such as junior or senior following a name. 15 CSR 30-15.010(2)3. She also permits the use of only a first and middle initials provided that on either the petition or the voting record both initials can be determined from the names given. 15 CSR 30-15.010(2)4. Her rules far exceed the authority granted by the statute which authorized her to adopt rules "...to insure uniform, complete and accurate checking of petition signatures...". Section 116.130.5, RSMo Cumm. Supp. 2005.

Section 116.130.1, RSMo Cumm. Supp. 2005 requires that the signature information on the petition be identical to the signature information registered with the local voting

authority. See *Callaway, supra* at 211. Respondent/Cross-Respondent Secretary has promulgated rules regarding what is acceptable for a voter address. 15 CSR 30-15.010(3)(A) requires that the address on the petition must be identical to the address on the voting rolls. The regulations then list numerous exceptions for the presence or absence of a letter or number identifying an apartment; or except for the presence or absence of a letter indicating the direction or location of a street; or except for the voter's address has been changed by city or postal authorities; or except for the address on the petition was the voter's registered address on the date the petition was signed; or except for the signatures match and the voter resides within the same local election authority. 15 CSR 30-15.010(3)(B)(C)(D)(E) and (4). Such exceptions do not provide for uniform, complete and accurate checking of petition addresses, but rather contribute to confusion, subjective decisions and taint on the initiative process.

Appellants/Cross-Respondents Missourians' Exhibit B to the September 8, 2006 Stipulation of Facts reflects the breadth and scope of the RDA issue. Hundreds of signatures have multiple potential name matches to other registered voters; some have more than twenty (20) potential matches; but none have street addresses which match with the signature address line on the petition. (Defendants/Intervenors Exhibit B). These findings support the rejection of RDA's or, at the minimum, the rejection of those RDA's with multiple possible matches.

Instead of providing uniform, complete and accurate procedures for checking of petition signatures, Respondent/Cross-Respondent Secretary has expanded the universe of

acceptable signatures to any variation that is vaguely recognizable to the signature name appearing in the petition page. Such procedures do not meet the statutory requirement of insuring "...uniform, complete and accurate checking of petition signatures...". Section 116.130.5, RSMo Cumm. Supp. 2005.

Administrative interpretations of a statute certainly never have been controlling or binding on a court. See e.g., *Rathjen v. Reorganized School Dist. R-II of Shelby Co.*, 284 S.W.2d 516, 526 (Mo. banc 1955); *Moore v. State Tax Com'n of Missouri*, 862 S.W.2d 407, 409 (Mo. App. E.D. 1993). Even when an administrative interpretation of a statute is provided, reviewing courts must still "exercise an unrestricted independent judgment and correct erroneous interpretations." *Lincoln County Stone Co. v. Koenig*, 21 S.W.3d 142, 145 (Mo. App. E.D. 2000). All that an administrative construction gets in court is serious consideration but it does not "preclude, restrict or control the right of complete review, of the issue by a reviewing court." *Kroger Company v. Industrial Com'n of Missouri*, 314 S.W.2d 250, 254 (Mo. App. E.D. 1958).

The language relating to addresses and RDA's contained in Respondent/Cross-Respondent Secretary's regulation not only have no underlying support in the statutory scheme, as addressed above, but also clearly conflict with the controlling precedent in the State of Missouri as voiced by the Western District in the *Yes to Stop Callaway* and *Payne* cases. The Western District Court of Appeals has expressly stated that a variance in addresses between that on the initiative petition and that in the voter registration records affirmatively makes the signature invalid for all purposes under Chapter 116, RSMo.

However, Respondent/Cross-Respondent Secretary's regulation completely reverses the Western District's determination. Obviously, Respondent/Cross-Respondent Secretary, as an executive branch officer, does not have the authority to overturn judicial determinations. Article II, Section 1 of the Missouri Constitution expressly provides for a separation of powers. Respondent/Cross-Respondent Secretary's action in promulgating the provisions of her rule regarding RDA's and address verifications is a clear attempt by the Respondent/Cross-Respondent Secretary to overrule long standing Missouri precedent with no statutory authority to do so.

While Respondent/Cross-Respondent Secretary may argue the statutory changes in Chapter 115, as discussed above, she cannot point to any action which has overturned the Western District's decisions which are directly applicable to her. Certainly, the regulation of the Respondent/Cross-Respondent Secretary with respect to the address issues and signature verification exceeds her statutory authority, but it also violates the general separation of powers contained in Article II, Section 1 of the Missouri Constitution and on that basis ought to be invalidated.

Other courts have considered different voter addresses on signature petitions and invalidated those signatures. In a similar case involving Arkansas law which also requires that the address on an initiative petition must match the address on file with local election authority, the Eighth Circuit Court of Appeals upheld the statute by determining that the requirement insured that the proposed ballot enjoyed support of citizens who were registered to vote on the initiative measure. *Hoyle v. Priest*, 265 F.3d 699, 703 (8th Cir. 2001). The

Court also held that regulating who was qualified to sign an initiative petition did not violate the First Amendment. *Id.* at 704, citing *Dobrobolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997). Similarly, in the case at bar, the statute which requires that the voter's address on the petition must match the voter's address on the registration records of the local election authority does not implicate the First Amendment and that the state law does not restrict political speech. Respondent/Cross-Respondent Secretary's interest in protecting the integrity of the initiative petition process should be paramount.

If this Court finds any part of 15 CSR 15-30.010 to be invalid the entire regulation is declared null and void as illegal. Section 536.014, RSMo. This statute states that no department, agency, commission or board rule shall be valid in the event that: (1) there is an absence of statutory authority for the rule or any portion thereof; (2) the rule is in conflict with state law; or (3) the rule is so arbitrary and capricious as to create a substantial inequity so as to be unreasonably burdensome on the persons affected. Section 536.014, RSMo.

It is clear, pursuant to Section 536.014, RSMo that an entire rule is to be declared invalid even if only a portion thereof has been found to be illegal. Erroneous regulations are a nullity. *Bartlett & Company Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. App. 1983).

In the alternative, if the Court would determine that 15 CSR 30-15.010 is a valid rule, Respondent/Cross-Respondent Secretary has not conformed to it. Respondent/Cross-Respondent Secretary also accepted addresses that were different than those listed on the rolls of the local election authorities and did not come under any of the exceptions listed in

15 CSR 30-15.010(3). Many names were accepted by the Respondent/Cross-Respondent Secretary which were not identical to the names on the voting rolls and did not fit any of the exceptions listed in 15 CSR 30-15.010(2). This issue is more substantively discussed in Point III, below.

Respondent/Cross-Respondent Secretary's enforcement of her own rules has been arbitrary and capricious and should not be upheld by this Court.

II.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT THE SIGNATURES WHERE THE CONGRESSIONAL DISTRICT DESIGNATION WAS OMITTED ARE INVALID BECAUSE SECTIONS 116.040, RSMO, AND 116.130.3, RSMO, MANDATE THAT A SIGNER COMPLETE A CONGRESSIONAL DISTRICT DESIGNATION ON THE SIGNATURE LINE FOR SUCH A SIGNATURE TO BE VALID.

On the great majority of total petitions filed, the signators failed to place or have placed any Congressional District designation on any line of the entire page. The parties have agreed that this omission is so general and pervasive that, if this Court is to determine that the Congressional District designation is mandatory, the Respondents/Cross-Appellants Committee cannot sustain their burden of showing enough sufficient valid signatures to qualify the petition. (Joint Stipulation, L.F. 95). Accordingly, the legal resolution of this issue is effectively a dispositive resolution of all outstanding matters, if such requirement is upheld by this Court.

Section 116.040, RSMo provides the form for each page of an initiative petition for an amendment to the Missouri Constitution. Included in that form of petition are a list of signature line fields that must be filled out by a signer on the petition. Those fields are:

Signed name of the registered voter;

Date;

Address;

Zip code;

Congressional district; and

Printed or typed name.

Section 116.040, RSMo. There is no dispute that the form of petition contains these proper headings and fields to be completed by the signators.

It is clear from the plain language of Section 116.040, RSMo that the General Assembly envisioned a signer filling out a complete line, unless such signer was physically unable to do so. See Section 116.070, RSMo. The Congressional District designation is not only contained in Section 116.040, RSMo, but there is a specific statute enacted relating exclusively to Congressional District designations. Section 116.130.3, RSMo Cumm. Supp. 2005, states as follows:

> If the election authority or the Secretary of State determines that the congressional district number **written after the signature of any voter** is not the congressional district of which the voter is a resident, the election authority or the Secretary of State shall correct the congressional district number on the petition page. Failure of the voter to **give the voter's correct congressional district number** shall not by itself be grounds for not counting the voter's signature. (Emphasis supplied).

Section 116.130.3, RSMo.

This language clearly reflects the legislative intent that a voter must actually write a Congressional District number on his signature line. Appellants/Cross-Respondents Missourians are not contesting signatures where a signer **wrote** the wrong Congressional District and the local election authority or the Secretary of State corrected that number. However, the complete omission of a Congressional District designation clearly violates the plain language and the legislative intent of Section 116.130, RSMo Cumm. Supp. 2005. Even the "savings" clause, in Section 116.130.3, RSMo Cumm. Supp. 2005, is preconditioned upon a voter's **action of writing** some Congressional District number. Had the legislature intended to make the Congressional District designation completely irrelevant it could have easily done so, either by revising Section 116.040, RSMo Cumm. Supp. 2005 and removing the requirement of the Congressional District, or adding language to Section 116.130, RSMo reflecting that if a Congressional District designation is "omitted" that it would have no effect. The legislature clearly did not do so and this Court should not add additional words to a plain legislative statement on this issue.

Appellants/Cross-Respondents Missourians can find no Missouri case law addressing the specific requirement relating to Congressional District designation. However, the law on statutory interpretation is clear and has been affirmed by this Court, that where language is specifically included, or excluded, in statutes that the legislative intent must be followed. As this Court has noted, "that which is clearly implied by statute is as much a part of that statute as if it were expressly placed in the wording of the statute." *Bowers v. Missouri Mutual Association*, 62 S.W.2d 1058, 1063 (Mo. 1933). The Supreme Court's ruling in *Bowers* has

been continued up to the present by this Court. See e.g., *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. banc 2003) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003); and *Corvera Abatement Techs., Inc. v. Air Conservation Com'n*, 973 S.W.2d 851, 858 (Mo. banc 1998).

In looking at the plain language of Section 116.130.3, RSMo Cumm. Supp. 2005, the legislative intent of the statute is quite clear, a congressional district designation must be placed on the petition by the signer. Where the statutory language is clear, courts should not seek to look at any other method of interpretation and enforce the legislature's intent based upon that plain language. See *Vance Brothers, Inc. v. Obermiller Construction Services, Inc.*, 181 S.W.3d 562, 564 (Mo. banc 2006). See also *State ex rel. Nixon v. Quik-Trip Corporation*, 133 S.W.3d 33, 37 (Mo. banc 2004) (noting that courts should use the plain and ordinary meaning of the language to determine the intent of the legislature).

The trial court ignored the plain language of the statute or, in the alternative, added new words into the statute to allow an **omitted** Congressional District designation to be turned into an incorrectly **"written"** Congressional District designation. This argument violates the fundamental tenet that the court should not add or alter existing language in a statute. See e.g., *Missouri Public Service Co. v. Platte - Clay Elec. Co-op, Inc.*, 408 S.W.2d 883, 891 (Mo. 1966); and *Department of Social Services v. Brundage*, 85 S.W.3d 43, 49 (Mo. App. W.D. 2002) (finding that no claim of action could be maintained by creditors against a small estate affiant where no authority was contained in the statute).

The trial court's decision in finding the Congressional District designations were not required was based upon mistaken reliance on language in a statute and in an invalid regulation. The Court stated:

> Missouri statutes and the Secretary of State's regulations specifically state that a correct congressional district is not required for a valid signature. Section 116.130.3, RSMo; 15 CSR 30-15.010(5); 15 CSR 30-150.020(1)(g).

L.F. 140.

The trial court ignored the claim presented by Appellants/Cross-Respondents Missourians and instead answered a question which was not presented. The question is not whether a correct or incorrect Congressional District designation was placed on the signature line, but what affect no Congressional District being placed at all would have upon the validity of a signature. Section 116.130.3, RSMo Cumm. Supp. 2005, which is thoroughly discussed above, only addresses the situation where a signer placed the wrong Congressional District designation upon the signature page. In that situation, the local election authority or Respondent/Cross-Respondent Secretary is allowed to correct that. In this case, neither happened; there was no Congressional District designation placed on the signature line, and there was no Congressional District designation placed upon the signature line by the local election authority. Accordingly, Section 116.130.3, RSMo Cumm. Supp. 2005 not only does not support the trial court's decision but in fact mitigates against the trial court's decision as referenced above.

The regulations of Respondent/Cross-Respondent Secretary also do not support the trial court's position. 15 CSR 30-15.020(1)(g) states as follows:

> If a person is registered, but the **correct congressional district is not indicated on the petition, the incorrect number should be crossed out** and the correct number entered in the right margin.

15 CSR 30-15.010(1)(g).

This regulation simply restates the import of Section 116.130.3, RSMo Cumm. Supp. 2005, allowing a local election authority to change an incorrectly written Congressional District designation. This language does not stand for a proposition that the omission of a Congressional District designation in the first place is irrelevant or is somehow allowed to be corrected by a local election authority. Had that been the case the statute would specify that the omission of a Congressional District designation could be changed. It does not and the Respondent/Cross-Respondent Secretary's regulation referenced herein does not support the trial court's decision.

The other regulation, 15 CSR 30-15.010(5), clearly exceeds the plain language of the statute in question herein. This regulation states:

> In order for a name to be qualified to appear on the petition, there must be a valid voter name, address and signature. NOTE: Failure of any other information is not a reason to fail to certify a name as being qualified.

15 CSR 30-15.010(5). This regulation has no support in any statute contained in the Revised Statutes of the State of Missouri. The Congressional District omission is not specifically referenced in this regulation, but there is an implication that any other information on a signator's line is irrelevant. That does not represent the status of the law in the State of Missouri. This language purports to make meaningless all the other requirements contained in Chapter 116, RSMo and Chapter 115, RSMo with respect to the verification of the signature. As such, the Respondent/Cross-Respondent Secretary's regulation exceeds her authority and is invalid and should not be followed by the Court in this matter. This Court has properly determined that a regulation can never go beyond the scope of the statutory authority.

> Regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. Erroneous regulations are a nullity.

Herst Corp. v. Director of Revenue, 779 S.W.2d 557, 558-559 (Mo. banc 1989). The Court in *Herst* rejected a Department of Revenue regulation that created an exemption not contained within the statutory exemption scheme under the sales tax law. *Id.* at 560. The current matter, 15 CSR 30-15.010(5), creates a new exception not contained within the statutory authority with respect to the validation of signatures in an initiative petition. By waiving all other statutory requirements, the Respondent/Cross-Respondent Secretary's regulation has exceeded its statutory authorization and thus must be a nullity.

Additionally, the language contained in this regulation does not discuss the omission by a signer of a piece of information required by the statute. The language "failure of" does not include "omission of." Respondent/Cross-Respondent Secretary could have clearly stated "omission" in its regulation had she wished to apply the regulation to omitted Congressional District designations. The trial court's interpretation of this regulation is improper and incorrect. If taken to its ultimate conclusion, the trial court's interpretation is that as long as a name, address and signature is on a signature petition, regardless of when the petition was signed, where the petition was signed, or what was on the petition, a signature would be counted valid. This clearly conflicts with the State's interest in preserving the integrity of the initiative process as outlined in *Ketchum v. Blunt, supra*. For that reason, Respondent/Cross-Respondent Secretary's regulation is either a nullity or has been misinterpreted by the trial court. In either event, the trial court's determination that the Congressional District designation is not required for a valid signature is incorrect and should be overturned by this Court.

The failure of a signatory to indicate his Congressional District where required on the petition is fatal to that signatory line. The plain language of Sections 116.040, RSMo and 116.130.3, RSMo Cumm. Supp. 2005 clearly demonstrates the legislative intent that a Congressional District designation be placed upon the petition. This requirement should be enforced by this Court and such signatures should not be counted.[3]

III.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT NAMES AND ADDRESSES WHICH DID NOT MATCH THE PHYSICAL VOTER REGISTRATION RECORDS ON FILE WITH LOCAL ELECTION AUTHORITIES ARE INVALID BECAUSE SECTION 116.130.1, RSMO, ONLY ALLOWS THE LOCAL ELECTION AUTHORITIES TO USE THE VOTER REGISTRATION RECORDS ON FILE IN THEIR JURISDICTION FOR VERIFICATION OF NAMES AND ADDRESSES AND NOT ON THE STATEWIDE ELECTRONIC VOTER DATABASE CONTROLLED BY RESPONDENT/CROSS-RESPONDENT SECRETARY.

Section 116.130.1, RSMo Cumm. Supp. 2005 provides that the local election authority "shall check the signatures against voter registration records in the election authority's jurisdiction." Section 116.130.1, RSMo Cumm. Supp. 2005. This provision does not make allowance for any other means of verification but use of the local voter identification records. The use of the so called "statewide voter registration database" is not an appropriate substitute under Section 116.130, RSMo Cumm. Supp. 2005 for the purposes of verifying signatures against voter registration records. The trial court erred in authorizing local election authorities to use voter information that was not in their files but were instead in a software system, controlled by Respondent/Cross-Respondent Secretary. The plain language of Section 116.130.1, RSMo Cumm. Supp. 2005, mandates reversal of the trial court's decision. Section 116.130, RSMo Cumm. Supp. 2005 could have been amended to

provide that the statewide voter registration database could be the appropriate means; however, it was not amended by the General Assembly in such a manner. (See discussion regarding adding or modifying legislation, in Point I.)

The statewide voter database appears to be that which is called for by the Help America Vote Act (HAVA) specifically codified at 42 USCA §15483(a). The statewide voter registration list, as it is called, in HAVA specifically says that the sole purpose of the computerized list is to "serve as the official voter registration list for the **conduct of all elections for federal office** in the state." 42 USCA § 15483(a)(1)(A)(viii). Similarly, the Federal Voting Rights Act also specifies that the actions taken by local officials shall not "deny the right of any individual to vote in any election...". 42 USCA § 1971(a)(2)(B). The issues in question in this matter, however, do not in any way infringe upon or impact the right of a person to **vote in an election**. The actions taken in **qualifying a signature** or not qualifying a signature solely for an initiative petition have **no** impact upon **the ability of that person to vote** in any election. It simply goes to the validity and accuracy of the initiative petitions that are circulated.

While no Missouri court has specifically addressed this particular issue, the Supreme Court of Pennsylvania did specifically address a similar issue related to the Federal Voting Rights Act. In the case of *In re Nader*, 858 A.2d 1167 (Pa. 2004), the Pennsylvania Supreme Court addressed the attempt of a petition drive to get Ralph Nader on the November, 2004 ballot. The proponents asserted that problems with names and addresses were irrelevant and

that such signatures should have been counted and relied upon the Voting Rights Act. The Court rejected this argument stating:

> Reliance on this section of the Voting Rights Act [42 USC § 1971(a)(2)(B)] is misplaced because *Silcox* and *Flaherty* do not concern the right of an individual to vote. Rather, they explain the steps that a candidate must take in order to be properly placed on the ballot.

In re Nader, 858 A.2d 1167, 1183 (Pa. 2004). Pointedly, HAVA and the Federal Voting Rights Act have no application to the determination of validity of signatures. Only Chapter 116, RSMo controls the verification and validation of signatures in Missouri.

Section 116.130.1, RSMo Cumm. Supp. 2005 provides that the signatures must be checked against voter registration records in the election authority's jurisdiction. The local election authority is mandated to maintain all voter registration records. Section 115.145, RSMo.[4]

The failure of election authorities to verify addresses directly to the original voter registration cards, in their possession, presents an issue where such addresses do not match the addresses on the voter registration cards. A great number of the proposed rehabilitated signatures, put forth by the Respondents/Cross-Appellants Committee, reflect that the street address on the Petition does not match the street address on the original documents as have been provided. Such signature lines should be rejected.

The Western District Court of Appeals has clearly stated that the failure of a signature's address to match to the voter registration records, which are maintained by the local election authority, invalidates such signature. *Yes to Stop Callaway Committee v. Kirkpatrick*, 685 S.W.2d 209, 211 (Mo. App. W.D. 1984). This issue has been more thoroughly addressed in Point I on the RDA issue, supra.

Simply put, if the address of a proposed signator does not match the address in the physical voter registration record, maintained by the local election authority, then pursuant to Chapter 116, RSMo and the controlling precedent of *Yes to Stop Callaway Committee, supra*, such signature line must be rejected.

IV.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURE LINES WITH INCOMPLETE NAMES, ADDRESSES AND DATES SHOULD NOT HAVE BEEN COUNTED BECAUSE THE FAILURE TO FULLY AND ACCURATELY COMPLETE SIGNATURE LINES ON A PETITION RESULTS IN SUCH SIGNATURES BEING INVALID UNDER SECTION 116.130, RSMo.

The addresses, names and dates identified and referenced in the Stipulation of Facts (L.F. 94-99) and attached Exhibits filed with this Court clearly show that key information required by Section 116.040, RSMo and to be verified by Section 116.130, RSMo Cumm. Supp. 2005 were not provided on the petition signature lines. This lack of required information is sufficient basis to reject such signatures. The use of the Respondent/Cross-Respondent Secretary's regulation exceeds the scope of the authority vested in Chapter 116, RSMo and specifically Section 116.040, RSMo and Section 116.130, RSMo Cumm. Supp. 2005. The validity of Respondent/Cross Respondent Secretary's regulation has been detailed and addressed in Points I and II, supra, and will not be restated, but is incorporated as if restated herein.

In determining whether sufficient information is provided on a petition, Missouri's case law does not sufficiently address many of the issues. While *Yes to Stop Callaway County v. Kirkpatrick, supra* is clearly the prime case in the State of Missouri addressing

what is required in signature verification, it does not go into substantive detail on what information should be included or omitted to count a signature as valid. Fortunately, Missouri is not the only state that has reviewed initiative petitions in recent years and conducted detailed signature reviews.

In 2004, an attempt was made to place Ralph Nader on the election ballot in the State of Pennsylvania through the use of petitions. The circulators filed a sufficient number of petitions to meet the statutory requirement in Pennsylvania, however, questions arose as to the validity of such signature lines. *In re Nader*, 865 A.2d 8 (Pa. Comm. 2004), the Commonwealth Court of Pennsylvania conducted a detailed signature review pursuant to the remand from the Supreme Court of Pennsylvania in preceding version of the case, *In re Nader*, 858 A.2d 1167 (Pa. 2004). The Commonwealth Court in the *Nader* case conducted an exhaustive review of all of the signatures submitted in support of Nader's application to be on the Pennsylvania presidential ballot. The Court then issued a comprehensive decision which is, without any question, the most thorough and efficient discussion of a signature challenge in the history of American jurisprudence.

The Court reviewed a number of different issues, some of which are presented in this case. With respect to the issue regarding the address, the Court noted that certain signature lines omitted information that should be placed on a petition, including "printed name and residence, giving city, borough or township, with street and number, if any, and shall also add the date of signing expressed in words or numbers." *In re Nader*, 865 A.2d at 109. The Court explicitly found that certain lines omitted parts of this information and therefore all

such lines must be stricken. *Id.* The Court also rejected signatures listing an address within the election jurisdiction where the elector with the same name was registered in the same county but at a different address. *Id.* at 108. The Court also rejected signatures that used ditto marks. *Id.* at 175.

Similar rejections were made where the signer's name was completed by another or where that information was incomplete when compared to the voter records. *Id.* The Court also rejected signature lines where the date of signature was written by someone different than the signer. The Court rejected those lines "because information on the signature line was in the hand of someone other than the signer." *Id.* at 257. The Court did hold out an exception where it could be shown that the signer was elderly and unable to complete the information on their own. *Id.* This exception is nearly identical to the Missouri statutory scheme, which allows the information of an elderly or infirm person to be filled in by the circulator. Section 116.070, RSMo.

The net effect was that after a long decision evaluating every line and every challenge, the Court held that these types of address, name, and date flaws were sufficient to reject the signatures and thus invalidate the overall petition. *Id.* at 18. This analysis should be adopted by this Court and any omission of information or inaccurate address information, as compared to the voter rolls, should be sufficient to strike the signature on the petition.

Where lines have information added by someone other than the signer, such signatures should be rejected. The Pennsylvania Commonwealth Court's analysis is directly on point and should be adopted by this Court and such signature lines where the address is not fully

completed or where the address components, including the city name, and/or the date was added by another person, the signature should be rejected as invalid by this Court.

V.

THE TRIAL COURT ERRED IN DECLARING THAT THERE WERE SUFFICIENT SIGNATURES ON THE TOBACCO TAX INITIATIVE PETITION IN THAT SIGNATURES ON PETITION PAGES WITHOUT A COMPLETE CIRULATOR'S AFFIDAVIT SHOULD NOT BE COUNTED BECAUSE SUCH SIGNATURES DO NOT COMPLY WITH SECTION 116.040, RSMO, WHICH REQUIRES THE CIRCULATORS OF INITIATIVE PETITIONS TO COMPLETE AN AFFIDAVIT INCLUDING THE CIRCULATOR'S SIGNATURE, WHICH MUST BE NOTARIZED.

The great majority of the petition pages have no problems with the circulator's affidavits; however, there are several petition pages that have significant flaws that invalidate the entire page. The provisions of Chapter 116, RSMo mandate that the petition have a specific affidavit completed by the circulator and signed by the circulator before a notary. Section 116.040, RSMo. The failure of the circulator to properly execute the affidavit is fatal. Similarly, an improperly executed, or unexecuted, notarization also is fatal to the petition page.

Section 116.040, RSMo, provides for the form of the initiative petition and a circulator's affidavit. This form shall be substantially complied with pursuant to the language in Section 116.040, RSMo. There is no dispute that the typewritten portion of the circulator's affidavit complies with the provisions of Section 116.040, RSMo. However, Section 116.040, RSMo also requires that this form must be substantially followed and the

requirements of Section 116.050, RSMo and Section 116.080, RSMo must be met. Section 116.040, RSMo. Section 116.050, RSMo has no reference to the circulator's affidavit or the notarization thereof. However, Section 116.080, RSMo does contain mandatory language.

> Each petition circulator shall subscribe and swear to the proper affidavit on each petition page such circulator submits before a notary public commissioned in Missouri. When notarizing a circulator's signature, a notary public shall sign his or her official signature and affix his or her official seal to the affidavit only if the circulator personally appears before the notary and subscribes and swears to the affidavit in his or her presence.

Section 116.080.4, RSMo. This language clearly mandates that the circulator properly complete his affidavit and execute it before a notary. Where such does not occur, the signatures on such page have no validity.

The trial court found that *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. banc 1978) is the controlling case on this issue. The old precedent of *United Labor, supra* should no longer be controlling in Missouri. More recent cases from a number of jurisdictions reflect that election laws should be more carefully reviewed and that substantial compliance should only be available where the statute specifies that substantial compliance is the standard.

The *United Labor* case was handed down by this Court prior to the enactment of Section 116.080, RSMo in 1980 and its amendment in 1999.[5] In the years since the *United*

Labor case, the decisions of the United States Supreme Court and other courts across the country have indicated that the requirements related to signature gathering and circulator affidavits do not infringe upon the constitutional rights of persons wishing to sign initiative petitions. In 1999, the United States Supreme Court in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), upheld the restrictions on signature gathering in Colorado. The Supreme Court in *Buckley* expressly found and adopted the underlying 10th Circuit decision upholding the affidavit requirements in the State of Colorado on initiative petitions. *Id.* at 191. The Court referenced the affidavit requirement on a number of different locations throughout its decision in *Buckley* to show that other types of, what the Court deemed as more onerous requirements, were not necessary because of the affidavit requirement. *Id.* at 196, 198 and 205. The Court in *Buckley* emphasized the purpose for this holding and adopting the 10th Circuit's decision, stating as follows:

> As the 10th Circuit recognized in upholding the age restriction, the six month limit on circulation, and the affidavit requirement, states allowing valid initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to the election processes generally.

Id. at 191.

Similar to Colorado, other states have reviewed notarization and circulator's affidavits in determining the validity of signatures on initiative petitions. In a number of Ohio cases,

the Ohio appellate courts have reviewed notarization and circulator's affidavits. The courts in Ohio have consistently held that:

> election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that substantial compliance is permissible. *State ex rel. Phillips v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St. 3d 535, 539, 757 N.Ed. 319.

In re Protest of Brooks, 801 N.E.2d 503, 510 (Ohio App. 2003). The Court in *Brooks, supra*, looked at compensation statements and rejected petitions where such statement was not properly completed. *Id.* at 511. Section 116.080.4, RSMo, does not have a substantial compliance component, it is a mandatory provision and should be strictly enforced.

Similarly, Pennsylvania has rejected petition pages due to improper completion of circulator information and notarization. *In re Nader*, 865 A.2d 8 (Pa. Comm. 2004), *supra*. The Supreme Court of Maine has expressly found that the use of a statutory form is a minimal burden on a Petitioner and should be enforced. *Palesky v. Secretary of State*, 711 A.2d 129, 133 (Me. 1998).

Missouri has not addressed this issue in 28 years. Relying upon the out of date and obsolescent decision of *United Labor, supra*, serves no benefit to the citizens of the state of Missouri and the trial court erred in doing so. The purpose in having a statutory scheme for the collection of signatures is to insure the general electorate that there is some semblance of order in the initiative process. *See, Buckley v. American Constitutional Law Foundation,*

Inc., 525 U.S. 182, 205 and 287 (1999). The trial court's ruling ensures that chaos will rule and that the statutes of the state of Missouri, relating to initiatives, are meaningless and can be avoided and evaded by any person, foreign or domestic.

The requirement of a circulator affidavit is to ensure that the signatures are verified. Absent a full and complete affidavit, including the notarization, the signatures obtained should be invalidated. This Court should reverse the trial court and invalidate the signatures on the petition pages with improper circulator's affidavits, amounting to 393 signatures (L.F. 129) being invalidated.

VI.

THE COURT ERRED IN DECLARING THAT THE TOBACCO TAX INITIATIVE PETITION WAS SUFFICIENT IN THAT THE PROPOSED AMENDMENT VIOLATES ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION BECAUSE IT USES THE INITIATIVE TO APPROPRIATE EXISTING STATE REVENUES FOR THE PURPOSES OF THE AMENDMENT IN EXCESS OF THE REVENUES GENERATED BY THE PROPOSED TOBACCO TAX BY MANDATING ADDITIONAL GOVERNMENT EXPENDITURES TO ADMINISTER THE PROGRAMS WITHOUT PROVIDING FUNDS FOR SUCH ADMINISTRATION AND BY FIXING EXISTING APPROPRIATIONS FOR CERTAIN PROGRAMS.

The proposed constitutional amendment violates Article III, Section 51 of the Missouri Constitution, because the amendment would appropriate existing state revenues.[6] Article III, Section 51 states, in relevant part, as follows:

> The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby...

Mo. Const., Art. III, Sec. 50.

The proposed amendment goes far beyond appropriating merely the new tobacco tax revenues and appropriates funds from the general revenue fund by constitutional mandate in violation of Article III, Section 51. The new amendment mandates the creation of a new

bureaucracy to administer the portion of the funds which are directed to Medicaid-related programs.

Unlike the portion of funds going to the tobacco-related programs, there is no authorization in the proposed constitutional amendment for any of the new tobacco revenues to be used for administrative costs for the Department of Social Services.

A review of the plain language of the proposed amendment indicates that under Section 7, relating to tobacco programs, there is express authorization for the Department of Health and Senior Services to utilize a portion of the fund provided for tobacco programs for administrative costs to administer such programs. However, such authorizing language is not contained in Section 8, which relates to the Medicaid programs. In fact, the provisions of Section 8 mandate that every penny of the new tobacco tax, devoted for Medicaid purposes, be distributed through direct transfer payments with none retained by the Department of Social Services. The Department of Social Services is responsible for administering these funds, determining the proper payments to the various Medicaid providers and distributing such funds, yet no funding is authorized for this purpose.

The State Auditor's fiscal note, a copy of which is included in the Appendix at A90, reflects that the Department of Social Services will have significant operating costs as a result of the new requirements placed upon it by the constitutional amendment. (Appendix, page A99). Since the new money may not be used for these operating costs, the new amendment appropriates general revenue funds by constitutional fiat to pay for these new administrative costs.

The Department of Social Services is put in the difficult position of being between the rock of the mandate to oversee and distribute the new tobacco taxes and the hard place of being prohibited from using any of these new funds to defray the costs of the oversight. The proposed initiative makes no provision for the new funds to be used for administering such programs and yet makes no allowance for the Department of Social Services not to operate the programs if such funding is not available.

The appropriation required to administer the program by the Department of Social Services is not the only example of appropriations contained in the proposed initiative petition, without new money to pay for such additional appropriations. Subsection 12 of the proposed amendment is even a more egregious example of appropriation of existing state revenues by initiative contained in the proposed constitutional amendment. Subsection 12 states as follows:

> Net proceeds from the tax imposed by this section shall constitute new and additional funding for the initiatives and programs described in this section and shall not be used to replace existing funding as of July 1, 2006, for the same or similar initiatives and programs.

This language clearly reflects that the intent of the proposed constitutional amendment is to handcuff the General Assembly with respect to funding for existing programs. A restriction upon the use of existing state resources is the heart of the basis for the prohibition on appropriation by initiative.

The fundamental purpose of the Missouri Constitution restriction on appropriation by the initiative is to ensure that expenditures are solely the province of the General Assembly for existing funds. There are two types of appropriation of existing revenues that are prohibited by the initiative: a new mandated expense to be paid or a restriction on existing appropriations. The effect on the Department of Social Services is the former, while the provisions of Section 12 are the latter.

An amendment does not explicitly have to appropriate funds to violate the provisions of Article III, section 50. *State ex rel. Card v. Kauffman*, 517 S.W.2d 78, 80 (Mo. 1974). As this Court noted:

> While the proposed amendment does not in terms and in and of itself appropriate the money necessary to pay the compensation it mandates, it leaves no discretion to the city manager or the city council and in effect is an appropriation measure. By its plain intendment it requires the budget official to include the specified compensation in the budget, and requires the city council to approve it, regardless of any other financial considerations. The proposed amendment has the same effect as if it read that the sums necessary to carry out its provisions stand appropriated. There is no pretense that it creates or provides new revenues with which to fund the additional cost to the city.

Id. The *Card* case is directly on point. The provisions of the proposed amendment mandate that the Department of Social Services administer extensive new programs. However, there is no funding provided to administer such programs. Just as in *Card*, *supra*, the amendment must fail.[7]

There is limited precedent regarding this aspect of Article III, Section 51. However, the *Card* case certainly indicates that this Court has, in the past, taken into account the true effects of the a proposed initiative. The trial court, and the Respondents/Cross-Appellants Committee, focused only on the new money generated from the tax increase and completely ignored the administration that would be required by the Department of Social Services under the proposed amendment. This position is counter to other tax initiatives, which included funding for administrative purposes. See, Mo. Const. Art. IV, §43(a) (expressly providing for the tax revenue to be used for the "administration of the laws pertaining" to conservation.)

The State Auditor's fiscal note certainly raises an issue regarding the funding of new programs. If this Court would find that such new administrative costs does not result in the appropriation by the initiative, the unlimited mischief from other parties is frightening to the state budget. By mandating new government obligations and oversight functions, without funds to pay for such new obligations and functions, this amendment contains implied, if not express, appropriation of existing state revenues by the initiative and thus is invalid.

Thus, this Court should reverse the trial court's decision and hold that the proposed constitutional amendment is in violation of Article III, Section 51 of the Missouri

Constitution in that it appropriates existing state revenues by the initiative, is thus invalid, and therefore may not be placed upon the November 7, 2006, general election ballot.

VII.

THE COURT ERRED IN DECLARING THAT THE TOBACCO TAX INITIATIVE PETITION WAS SUFFICIENT IN THAT THE PROPOSED AMENDMENT VIOLATES ARTICLE III, SECTION 50 OF THE MISSOURI CONSTITUTION BECAUSE IT CONTAINS MULTIPLE SUBJECTS BY ADDING TOBACCO ISSUES AND A MAJOR MEDICAID PROGRAM EXPANSION AND ALTERING THE STATE AUDITOR'S DUTIES.

Article III, Section 50 of the Missouri Constitution relates to initiative petitions and states in relevant part as follows:

> Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution or one new article which shall not contain more than one subject in matters properly connected therewith...

Mo. Const., Art. III, Section 50.

The breadth and scope of the proposed amendment clearly exceeds this constitutional limitation on a single subject. By including a tobacco tax, and tobacco-related programs, the proponents have arguably constructed one subject. However, by adding a massive expansion of the Missouri Medicaid system, unrelated to tobacco or smoking, proponents have structured a second subject in the proposed amendment. Additionally, the changes to the State Auditor's powers and duties and the restrictions upon legislative discretion and appropriations establish two more subjects which are contained in the proposed constitutional amendment.

The proposed constitutional amendment in question purports to amend Article IV of the Missouri Constitution to add one new section, section 37(b). This proposed amendment contains over 3300 words and in the notice drafted by the proponents states as follows:

> You are advised that the proposed constitutional amendment changes, repeals or modifies by implication, or may be construed to change, repeal, or modify by implication, the following provisions of the constitution of Missouri–Section 1 of Article II, Sections 1, 36, 38(a), 39, 40, and 51 of Article III, Sections 1, 5, 12, 13, 15, 17, 19, 22, 28, 36(a), 37, 37(a), 39, 48, and 51 of Article IV, Section 3(b) of Article IX, Sections 1, 3, 16, 17, 18, 18(e), 19, 20, and 21 of Article X, and Sections 1, 2(a), and 2(b) of Article XII.

While the enacting language indicates only one article being amended, a notice provided by the proponents of the proposed constitutional amendment clearly note and reflect that the amendment alters and amends more than one article to the constitution, to-wit: Articles II, III, IV, IX, X, and XII.

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. banc 1990), is the seminal case in the state of Missouri on multiple subjects in a constitutional amendment. This Court, in that case, was presented with an amendment proposed to the Missouri Constitution which according to its own terms would only have amended Article III of the Missouri Constitution. *Id*. at 826. This Court rejected the argument made by the proponents that if an amendment was within one article, it was *per se* having only one subject, noting that an amendment could be so long as to repeal and reenact the entire constitution within one article. *Id*. at 829.

However, this Court has specified that in conducting the review of multiple subjects "the court must scrutinize the proposal to see if all matters included relate to a readily identifiable and reasonably narrow central purpose." *Id.* This Court in *Missourians to Protect the Initiative Process, supra,* determined that the proposed changes to the General Assembly and the "regulation of public official's conduct" were not similarly related to an extent to avoid the single subject requirements of the Missouri Constitution. *Id.* at 832. This Court then entered its order affirming the trial court's decision striking the amendment from the ballot in 1990. *Id.* at 833.

The analysis in *Missourians to Protect the Initiative Process* provides aid to this Court with the current proposed amendment. It is impossible to look at the proposed amendment and find only one general purpose for the amendment. As noted previously the amendment contains over 3300 words. While the proponents of this initiative petition are not obligated to specify what the single subject of the initiative petition is, any attempt to determine that single subject is doomed to failure.

The two divergent purposes and subjects contained in the proposed petition, would be tobacco cessation, and second, an unprecedented expansion of the state's Medicaid program, unrelated to smoking. An analysis of the provisions of the proposed amendment reflect this vast, divergent set of interests.

The first subsection of the proposed amendment contains a tobacco tax. Similarly, the first five definitions contained in the proposed amendment in subsection 2 relate to definitions related tobacco and cigarettes. A portion of the new revenues generated are

placed into a tobacco-related account and subsection 7 of the proposed amendment designates how the funds in said account are to be expended by the state for the sole purpose of tobacco related issues.

A second completely divergent subject is also contained in the proposed amendment: the expansion of the state Medicaid system. The final twelve definitions relate solely to Missouri's Medicaid system and calculation of payments into that system. Additionally, after the segregation of 82-1/2% of the tax proceeds being directed to an account for Medicaid purposes, subsection 8 of the proposed amendment deals with the expenditures of such moneys in support of the state Medicaid program.

Whether the subject of the proposed amendment is relating to tobacco or relating to Medicaid, it clearly presents two separate and divergent subjects. This proposed amendment should be contrasted with other amendments that included tax increases. For example, the conservation sales tax, found in Article IV, dedicates all taxes raised from the conservation sales tax to a relatively simple purpose, conservation department-related programs. *See* Mo. Const. Art. IV, Sec. 43(a) and (b).

This Court, in analyzing multiple subjects in statutory challenges, has looked to the provisions in the constitution with similar titles, finding that Article IV, Section 36(a), which was titled "Economic Development" was related to a single subject due to the sole power being vested in the Department of Economic Development:

> That section deals exclusively with the department of economic development and requires the department to administer all

> programs provided by law relating to the promotion of the economy of the state, the economic development of the state, trade and business, and other activities and programs impacting on the economy of the state.

Carmack v. Director of Agriculture, 945 S.W.2d 956, 960 (Mo. banc 1997). The proposed constitutional amendment before this Court cannot even claim that all funds are diverted and dedicated to the same department, as tobacco programs are dedicated to the Missouri Department of Health and Senior Services while the money devoted for Medicaid is dedicated to the Missouri Department of Social Services, much less that there is a single subject in the proposed amendment.

However, an even further in depth analysis of the proposed amendment finds that there are other subjects thrown in for good measure. For example, subsection 9 of the proposed amendment relates to the State Auditor's functions. As this Court has previously determined, the auditor's powers deal solely with post audits of accounts and do not relate to performance or management audits. *See Director of Revenue v. State Auditor,* 511 S.W.2d 779 (Mo. banc 1974). However, Section 9 of the proposed amendment goes far beyond requiring a financial post audit by the State Auditor. The proposed language contains a requirement that

> every three years the State Auditor shall prepare a comprehensive report assessing the work in progress of the programs established pursuant to this section. Such assessment report shall analyze the impact of programs, grants, and

> contracts performed, shall be provided to the Governor and General Assembly, and shall available to the public.

This language exceeds what is reasonably related to any possible single subject of the amendment. The State Auditor's powers are currently limited by Article IV, Section 13 as follows:

> No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

Mo. Const. Art. IV, Sec. 13. As can be seen, the proposed amendment completely changes the State Auditor's fundamental authority to solely do financial post audits and incorporates new management/performance-based reporting that this Court has determined is prohibited by the current constitutional provisions.

The validity of the amendment under the single subject restriction in the Missouri Constitution is ripe for adjudication by this Court. In *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W. 824 (Mo. banc 1990), this Court found that a challenge based upon multiple subjects was properly justiciable and ripe upon the issuance of the Secretary of State's Certificate of Sufficiency of the petition. While it was true that the Respondent/Cross-Respondent Secretary had not issued her Certificate of Sufficiency at the point the suit was filed; the trial court has now ordered her to issue her Certificate of Sufficiency, by judicial action, and she has placed the amendment on the ballot. Thus, it is appropriate for this Court to also take up the multiple subject challenge to the proposed

initiative petition. In the interest of judicial economy, this Court should address this issue at this time.

There is also no legitimate possibility of severing any of these sections and retaining the remainder of the amendment. The provisions relating to tobacco and those relating to Medicaid are so substantive, that the test for severability cannot be met. As this Court in *Missourians to Protect the Initiative Process* noted:

> since it is impossible to identify a single central purpose, it is necessarily impossible to identify those provisions that are essential to the efficacy of the amendment so that they may be segregated out. The severability argument has no merit.

Id. at 832. Thus, the proposed amendment contains multiple subjects and is invalid in its entirety.

This Court should reverse the trial court and find that the proposed constitutional amendment is violative of Article III, Section 50 of the Missouri Constitution in that it contains multiple subjects and therefore may not be placed upon the November 7, 2006, general election ballot.

CONCLUSION

The trial court's final judgment was in error in many aspects. The finding that the RDA's were valid signatures is not supported by the statutes in Chapter 116 or by the appellate precedent in this state. The action of the trial court to reverse the binding precedent of *Yes to Stop Callaway v. Kirkpatrick, supra*, should be reversed and the RDA's should not

be counted as valid signatures. The removal of the RDA signatures results in insufficient signatures in the Fifth Congressional District and thus would result in the proposed initiative petition being insufficient.

Similarly, the failure of signers to place any congressional district designation upon the petition signature lines, invalidates these signatures. The plain language of Section 116.130.3, RSMo Cumm. Supp. 2005 clearly states, and absolutely implies, that there must be a written congressional district designation for a signature to be valid. Respondent/Cross-Respondent Secretary's regulation which exceeds the scope of Chapter 116, RSMo and her authority thereunder should be invalidated also. The removal of signatures without congressional district designation results in insufficient signatures in the Fifth Congressional District and thus would result in the proposed initiative petition being insufficient.

The failure to use the actual voter registration records on file with a local election authority presents a direct conflict with the provisions of Section 116.130.1, RSMo Cumm. Supp. 2005 which require that the local election authority compare signatures to the records on file in their jurisdiction. Neither the Kansas City Board of Election Commissioners or the Jackson County Board of Election Commissioners, used the actual paper documents on file to verify signatures. Yet there were thousands of signature lines, validated by the local election authorities, in which the signature line did not match the voter registration information on file. The removal of such signatures results in insufficient signatures in the Fifth Congressional District and thus would result in the proposed initiative petition being insufficient.

Similarly, the failure to invalidate the signature lines where there was a variance in the signature, name, address, or date, was error by the trial court. The prior precedent in *Yes to Stop Callaway v. Kirkpatrick, supra*, clearly demonstrates that variances in names, addresses and dates is a sufficient basis to reject signatures. Just as the Pennsylvania courts in *In re Nader, supra* had noted accuracy on the lines is prerequisite to the counting of signatures. There is no provision in Chapter 116 that makes substantial compliance with a signer's information standard. The statutes presume that a signer will put down accurate information and when a signer does not such signature should not be counted. The removal of such signatures, where the signature, name, address or date varied from the voter registration record or, in the case of dates, was inaccurate as being predated, post-dated or date omitted, the petition would thus have insufficient signatures in the 5th Congressional District and the proposed initiative petition would be insufficient.

The improper and invalid circulator's affidavits, including improper notarization thereon, is also a basis for rejecting signatures which the trial court failed to acknowledge. Section 116.080.4, RSMo clearly requires that a circulator complete and execute the circulator's affidavit before a Notary Public. In the case where that is not done, such signatures should not be counted under Sections 116.080.4, RSMo and 116.040, RSMo. The language in Section 116.040, RSMo relating to substantial compliance **does not** apply to the circulator's affidavit as it is an express exception carved out by the plain language of Section 116.040, RSMo. This plain statutory language should not be ignored, as the trial court did; but instead should be enforced. As the Supreme Court noted in *Buckley v. American*

Constitutional Law Foundation, Inc., supra, properly executed circulator affidavits being required does not violate the Constitution and is in fact an expressly valid provision as opposed to many other potential constitutional flaws. Accordingly, the circulator affidavit requirement on a petition should be fully enforced. The removal of the signature with improper circulator's affidavits would result in a reduction of 393 signatures from the amount needed, which in conjunction with certain other line and signature issues may result in the petition being insufficient.

The proposed Tobacco Tax Initiative Petition also violates Article III, Section 51 of the Missouri Constitution by appropriating existing state revenues through the initiative. The Medicaid related funding is required to be administered by the Department of Social Services and the existing percentage of funding to such programs cannot be reduced by the General Assembly. Both of these requirements found in the proposed Initiative Petition control existing revenues of the State of Missouri. Since the proposed Tobacco Tax Initiative does not provide for any funds to administer the Medicaid related programs the state would be forced to use existing revenues to fund those programs; a concept which is in direct conflict with the plain language of Article III, Section 51 of the Missouri Constitution. There is no ability to sever any provision or add language to a constitutional provision to fix a defect under Article III, Section 51 of the Missouri Constitution and thus the trial court erred in finding the petition to be sufficient. This Court should reverse that decision and hold that mandating additional programs without additional funding is *per se* a violation of the Missouri Constitution.

Finally, the proposed Tobacco Tax Initiative Petition contains multiple subjects in violation of Article III, Section 50 of the Missouri Constitution by including a massive expansion of the Medicaid Program and altering the State Auditor's powers and duties. This proposed amendment is far beyond any single subject, such as relating to tobacco. Accordingly, the trial court erred in not finding the proposed amendment violative of Article III, Section 50 of the Missouri Constitution for containing multiple subjects. This Court should reverse the trial court and find that the petition is insufficient.

WHEREFORE, Appellants/Cross-Respondents Louis Smither, et al., pray that this Court reverse the trial court's decision determining that the proposed Tobacco Tax Initiative Petition is sufficient and issue an Order to the Secretary of State to take such steps as are appropriate to remove the proposed Tobacco Tax Initiative Petition, currently denominated as Amendment 3, from the November 7, 2006 ballot, and for such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Appellants/Cross-Respondents' Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 16,947 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellants/Cross-Respondents' Brief and Appendix were hand delivered to the following parties of record on this 22nd day of September, 2006:

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